United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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75-1004

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1004

UNITED STATES OF AMERICA,

Appellee,

against

ANTHONY M. NATELLI and JOSEPH SCANSAROLI,

Defendants-Appellants.

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
(D.C. Crim. No. 74 Cr. 43)

REPLY BRIEF ON BEHALF OF APPELLANT JOSEPH SCANSAROLI

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> *The reviewing problem has not been rendered easier of solution by the government's brief. . . . Its hyperbole in description is in many instances unsupported by the record or by any record references justifying its statements.* United States v. *Aloi,* Doc. No. 74-1220, Slip Op. 6057, 6065 (2d Cir. January 31, 1975).

I

The Evidence Was Insufficient to Support Conviction.

(Scansaroli Main Brief, pp. 17-29; Government Brief, pp. 26, 35-43)

Scansaroli's argument

In our main brief, we showed that the charge on which Scansaroli was tried rested on three specifications, none of which was supported by sufficient evidence: First, we demonstrated that Scansaroli had no meaningful role in the preparation of a footnote to NSMC's 1968 earnings as they appeared in the 1969 proxy statement; second, Scansaroli had nothing whatever to do with the decision to include in NSMC's nine-months' earnings a commitment from Eastern Airlines; and third, the decision not to exclude from those same nine-months' earnings certain contracts-in-progress questioned by the PMM accountant (Oberlander) Scansaroli had assigned to review them was arrived at in complete good faith and without the requisite criminal intent.

The government's response

The government's effort to disguise the inadequacies of proof in what the trial court felt was a "close" case

(T. 2134-35) proceeds in scatter-gun fashion, by simply lumping the defendants together, with neither citation to nor support in the record,* and by devoting as much if not more attention to the 1968 audit (which has never been charged as a crime against anyone) than to the 1969 proxy statement and the specifics of the charges against Scansaroli in this indictment.** But what does the government say when it finally gets down to the specific charges in this indictment?

A. The Footnote.

Who **prepared** the footnote?

The government asserts: "Natelli and Scansaroli set about to draft a footnote"; "In the course of preparing the footnote, Scansaroli subtracted $678,000" (both at Gov't. Br., p. 13); and "[T]he proof overwhelmingly showed that Scansaroli prepared the false statements in the proxy himself" (Gov't. Br., p. 38).

The government offers no citation to the record to support the first of these; indeed, it can not, for the only testimony on this subject was Natelli's and he testified that he—and **not** Scansaroli—drafted the footnote:

> Q. Then this [GX 17B] is a portion of the final proxy as it was printed going to the original draft, Notes C, D and E, who originally drafted those notes? A. I am quite sure that I did. (T. 1889; see also T. 1905-08)

What support does the government offer for its second assertion, that "Scansaroli subtracted $678,000" in the foot-

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* See, *e.g.*, Gov't. Br., p. 3 ("Natelli **and** Scansaroli improperly netted . . . erased . . . helped suppress"); p. 5 ("Natelli **and** Scansaroli acceded . . . made the adjustment"); p. 13 ("Natelli **and** Scansaroli set about to draft"); p. 14 ("Natelli **and** Scansaroli had effected without any disclosure"). Unless otherwise indicated in this brief, all emphasis has been added.

** See, *e.g.*, Gov't. Br., pp. 4-8; 19-20; 27-28; 35-36.

note? First, mystifyingly, NSMC's trial balance, a PMM work paper in Scansaroli's handwriting (GX 13 at p. 2530; E. 97). What is mystifying about this reference is that the trial balance contains no such subtraction: rather, an adjustment to sales in the amount of $678,562 is displayed for all to see.* Second, the government cites pages 890-91 in the trial transcript, which it describes as Natelli's acknowledgment that Scansaroli "probably" made the subtraction (Gov't. Br., p. 39). The government's citation is not to Natelli's **trial** testimony, but to Natelli's **Grand Jury** testimony which was offered and received as it should have been, as to Natelli alone (T. 886).** Natelli's **trial** testimony —unmentioned by the government—was simply that Scansaroli "was one of the individuals who possibly may have done it" (T. 2067-68). More to the point, however, is the plain fact that neither "probably" nor "possibly" means "did."

Finally, the government cites Johnston's testimony that it was Scansaroli's function to insert "numbers in the proxy draft" (T. 904), Kurek's testimony that Scansaroli and Johnston, among "a lot of different people" were working on the **third quarter** figures (T. 250), and Buck's testimony that Scansaroli "was in charge" of various individuals working on the proxy statement (T. 650-51). These broad generalities constitute the sum total of the evidence cited by the government as "overwhelmingly show[ing] that Scansaroli **prepared** the false statements in the proxy himself." The government cites no specific evidence, direct or circum-

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* A typewritten copy of the trial balance is reproduced as an addendum to this reply brief, for the convenience of the Court. It should be noted that Scansaroli specifically cross-referenced "(5)" the $678,562 to the journal entry which explains that the Michaels contracts are being written off (GX 13, p. 2531; E. 98).

** Regardless of the question of admissibility, the totality of the language used by Natelli in his Grand Jury testimony reflects not only the speculative nature of his answers (*e.g.*, "I am not sure"; "I believe"), but also the **lack** of any support for the government's present assertion.

stantial, that Scansaroli drafted or revised the footnote, inserted the numbers or performed the subtraction. It did not cite any such evidence for the simple reason that there was none.*

In any event, and even if the government had proved that Scansaroli performed the mechanical function of **inserting** the numbers (and that was all it even purports to have proved), it offers nothing to show that Scansaroli was responsible for the **decision** to reflect the Michaels write-offs in the line of the footnote relating to the effects on earnings of later-acquired companies. It was Natelli's testimony that he and Leon Otkiss, a PMM SEC reviewing partner, made this decision (T. 1905-10). All that the government contends in response is that "Scansaroli acknowledged [in his Grand Jury testimony] that he and Natelli decided, on their 'own hook' against the disclosure" of the write-offs (Gov't. Br., p. 39). But what does the record show?

The record reveals that the words the government attributes to Scansaroli were spoken by the **prosecutor,** and that Scansaroli was being asked to tell the Grand Jury not what **he** decided, but whether the decision on the footnote was arrived at independently of management (NSMC) influence.

> Q. Was that decision discussed in your presence with any of the management from National Student Marketing Corporation? A. I don't recall. I don't think so, but I can't recall if it was.

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* Moreover, the government's assertions as to Scansaroli are contradicted by its assertions that it was Natelli who "omitted to disclose," that it was Natelli who "personally scratched out" references to the write-offs, and that it was Natelli who "deliberately subtracted" lost sales from the pooled companies' figures (Gov't. Br., p. 29). Needless to say, our mention of these government contentions is in no way intended to indicate our acceptance of the government's assertions that Anthony Natelli did something wrong.

> Q. That was a decision that you and Mr. Natelli arrived at **on you own hook, so to speak?** A. Yes. (T. 884-884a)

Viewed in the light most favorable to the government, the evidence as a whole showed only that Natelli discussed his decision with Scansaroli in the early stages of the decision-making process, and that Scansaroli knew full well that Otkiss would have the final word (T. 884, 1909). This showing could not enable a reasonable jury to fairly conclude that Scansaroli's participation in the preparation of the footnote was sufficient to result in criminal liability.

Having failed utterly to prove Scansaroli's participation in the preparation of the footnote, the government seeks to rely on its reconstructed view of the evidence relating to the deferred tax credit. The government makes three arguments: First, the tax credit was "phony" (a characterization freely applied at trial (T. 2287, 2291, 2316), but studiously minimized here); second, the tax credit was improperly "netted" with the Michaels write-offs; and third, Scansaroli's testimony concerning "computation" of the tax credit was false.

The most disturbing aspect of this branch of the government's argument is the deliberate omission of any reference whatsoever to the testimony of Carol Raimondo, a member of the PMM tax department (T. 1381-99). Ms. Raimondo testified that in May 1969, while **she** was working on NSMC's 1968 tax return, **she** wrote a note [NX O; E. 484] "questioning whether or not the large—the provision, the amount of deferred tax provision that was provided at August 31, 1968 was necessary" (T. 1384). Ms. Raimondo testified that **she** raised the matter with Scansaroli, with Natelli and with Eugene Holloway, the partner in charge of PMM's tax department (T. 1386). Ms. Raimondo testified that **she** concluded that no deferred tax liability provision was necessary (T. 1390). As the trial court put it, and Ms. Raimondo concurred, the deferred tax liability provision then on NSMC's books was "practically wiped out" (T. 1390).

The government's failure to address Ms. Raimondo's testimony (except in an effort to create a non-existent credibility issue, discussed below) is inexcusable. Whether or not her views were subsequently found to be incorrect, her testimony—unchallenged and unmentioned by the government—is fatal to its argument that **Scansaroli** fabricated a "phony" credit.

The government repeatedly asserts that Scansaroli "netted" the tax credit with the Michaels write-offs to conceal the loss, and ultimately pronounces that this asserted "netting" was a violation, by Scansaroli, of generally accepted accounting principles (Gov't. Br., pp. 25 and 37). The government does not cite anything in the record showing that the tax credit was "netted" by Scansaroli. There was no such evidence.

The documents to which Scansaroli put his hand reflect no such "netting." What Scansaroli did—"permissibly" according to government witness Buck (T. 665)—merely effected two adjustments in a single entry (T. 1539-42). The journal entry (GX 13, p. 2531; E. 98) and the trial balance (GX 13, p. 2530; E. 97) Scansaroli prepared both reflect the tax credit as a **separate** item, clearly and individually identified. And any notion that Scansaroli "netted" the tax credit and the losses in the footnote is subject to the same infirmity that pervades the government's entire case on the footnote: There was insufficient evidence to prove that Scansaroli had any meaningful role in its preparation.

Finally, the government constructs an argument that Scansaroli's testimony concerning "computation" of the tax credit demonstrates his criminality. The government argues that Scansaroli "told the jury [which he did] that Carol Raimondo had computed" the tax credit, that "Ms. Raimondo denied [which she did] having computed the credit" and that "Scansaroli was unable to explain the highly unusual circumstances as to how the extremely com-

plicated tax credit was computed without any workpapers evidencing the calculation" (Gov't. Br., pp. 37-38).

But what the government advances as a conflict between the testimony of Ms. Raimondo and that of Scansaroli is really no conflict at all.* As Scansaroli testified, the facts are strikingly simple: Carol Raimondo concluded that no deferred tax provision was necessary and that what had previously been provided was simply to be eliminated. No computation was done by anyone, because none was needed:

> I'm saying at this point now what I know. There could not have been any computations. It was the obvious fact that [what] was on the books did not belong on the books. It didn't need to make a computation. The difference—the computation was just taken from the books, taken back off. (T. 1688)**

In sum, the PMM tax department concluded and informed Scansaroli that a provision for deferred taxes was unnecessary; Scansaroli prepared a journal entry (GX 13, p. 2531; E. 98) and a trial balance (GX 13, p. 2530; E. 97), reflecting the elimination of the deferred tax provision—a tax credit—as was ultimately set forth in the NSMC 1968 consolidated statement of earnings contained in the proxy statement (GX 25, p. 21; E. 167).

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* Striving to create the appearance of a conflict between the testimony of Raimondo and Scansaroli, the prosecutor challenged Scansaroli with disputing Raimondo's testimony that she did not compute the tax credit. The "conflict" was dissolved immediately: "[S]he told me that no liabilities should have existed as of that date. That, in effect, is the same as computing it." (T. 1687).

** The government argues that Scansaroli's testimony was contradicted by Natelli. It is curious, however, that when it deals with Natelli's conviction, the government asserts that Natelli's testimony was "false and evasive" (Gov't. Br., p. 32), yet when it comes to the tax credit, the government contends that Scansaroli should be disbelieved because Natelli contradicted him. In any event, the "conflict" seen by the government on what should be a peripheral issue hardly causes Carol Raimondo's testimony, or her contemporaneous memorandum, to evaporate.

B. The Eastern Commitment.

The government's argument that sufficient evidence was introduced from which the jury could find beyond a reasonable doubt that Joseph Scansaroli "caused [the Eastern commitment] to be booked in substitution for the written off Pontiac 'sale'" is premised solely on Scansaroli's presence at Pandick Press while he was working on the proxy statement in the early hours of the morning.

The government tells this Court that "Scansaroli was **present** when the Eastern 'sale' was first proposed . . . at about 3:00 a.m. at the printer's plant . . ." (p. 40); that "Natelli, **in the presence of Scansaroli**" told Randell he would not accept the Pontiac commitment letter and "Randell coolly replied that he had a 'commitment' from Eastern Airlines . . ." (p. 15); that Kurek testified that "Scansaroli was **present**" at the time of these conversations between Natelli and Randell; and that Natelli attested to Scansaroli's **presence** (p. 41).*

In making this argument, the government continues to deliberately close its eyes to the trial court's analysis of the proof with respect to the Eastern commitment:

> The government **somehow** argues something about Scansaroli being involved in the evening in [the printer's]. At least I read it that way . . . I don't understand that Scansaroli was there at all doing these things about the Eastern deal and all that. He was there, but he wasn't doing this kind of thing. . . . **And no one said to the contrary.** (A. 255)

Judge Tyler obviously had in mind certain facts which the government carefully omits from its presentation:

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* We discuss below (at pages 17-19) the glaring inconsistency between this contention for criminal liability based on mere **presence** and the later contention (Gov't. Br., p. 68) that no detailed or precise charge on aiding and abetting was needed since mere **presence** was not an issue at trial.

Scansaroli was deeply involved at the printer's in the mechanical and tedious task of checking and cross-checking figures (T. 1559-60, 1919-21); the room at the printer's in which the work was being done and in which Scansaroli was "present" was described as half the size of one of the large courtrooms in this building (T. 2050); the atmosphere was characterized as "hectic", and no wonder since there were at least nine people in the room with adding machines going, food being served, and proofreading being done (T. 438-39); and, perhaps most important, Scansaroli **left** the printer's plant **before** the documentation for the Eastern commitment arrived (T. 1561, 1927-28).

The government points to nothing that Joseph Scansaroli **did** that in any way connects him with the decision to book Eastern Airlines. There is nothing to point to. Unwilling to accept this simple fact, the government fires one additional pointless arrow: "And Scansaroli had to acknowledge that he knew that switch to be 'strange'" (Gov't Br., p. 41). Scansaroli never "acknowledged" any such thing: What he testified he **later** thought was "strange" was that to his knowledge Eastern had not been brought to PMM's attention earlier in the year (T. 1708-09).

C. The Contracts Reviewed by Oberlander.

The government begins its analysis of the Oberlander review by omitting the material fact that Scansaroli, who could have asked Oberlander to do anything, specifically assigned him to review the contracts-in-progress (T. 749). In any event, Kurek declined to discuss the contracts with Oberlander, stating that he wanted "somebody that's got some authority to come over and go through it with me" (T. 266-67).* The government then asserts that after meeting with Kurek, Scansaroli "agreed not to change the proxy statement to reflect these additional bad sales."

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* The government's brief erroneously states that "Kurek asked for Scansaroli" (p. 16).

(Gov't. Br., p. 16, repeated at p. 42). What explanation is there for the government's omission of the fact that the result of the meeting at which Kurek and Scansaroli discussed Oberlander's schedules was **not** that the proxy was unchanged, but rather that the proxy statement **was** changed when, as a result of the conversation between Scansaroli and Kurek, approximately $120,000 of the items which Oberlander had questioned were written off.*

This is the second time this fact seems to have escaped the government's notice, for when Kurek testified on direct examination he made precisely the same mistake (T. 271-72). But on cross-examination he freely acknowledged the truth of the matter:

> Q. In any event, Mr. Scansaroli came over, you and he reviewed the Oberlander workpapers, Syntex was written off or was decided that Syntex would be written off, and as to the balance a decision was reached that it was not a material item which warranted any further change in the financial statements at 5-31-69, is that correct? A. That's correct.
>
> Q. In making that decision, were you and Mr. Scansaroli so far as you were concerned, engaged in any underhanded conduct? A. Not that I know of.
>
> Q. You were both accountants and you were reviewing this matter to make a decision so that you could do the best you could to reflect the financial picture of the company, is that correct? A. That's correct. (T. 408-09)

What evidence did the government offer to show that the decision with respect to the materiality of contracts other than Syntex, as described by Kurek, was made with the requisite criminal intent? First, says the government, Scan-

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* The written off contracts that the government omits to mention related to Syntex, the **booking** of which the government repeatedly attributes to Scansaroli (pp. 20, 36).

saroli was motivated by his fear that revelation of the work he did during the 1968 audit would lead to loss of his license (Gov't. Br., p. 11). But, as pointed out in our main brief (p. 27), while this might have had some connection with the **footnote**—if Scansaroli had prepared it—it had no connection with NSMC's nine-months' 1969 earnings. If anything, this supposed fear would have driven Scansaroli in precisely the opposite direction in 1969.

The government does not deign to address this point, nor, as mentioned above, does it deal with the fact that if Scansaroli was so motivated, he would surely have reviewed the contracts-in-progress himself during the August 1969 review, as he had done in May, rather than assigning precisely that task to Oberlander (T. 749). Moreover, would Scansaroli, motivated as the government says he was, have suggested **additional** audit steps concerning contracts in progress to Johnston (T. 977-80)? Would he have shown his workpapers to an outsider so readily (T. 1413-15)?

The government offers no answers to these questions. Instead, the government retreats into the 1968 audit and recites a long list (Gov't. Br., pp. 19-20) of shortcomings acknowledged by Scansaroli, who conceded he had been "too easily satisfied" (T. 1661),* and flails at asserted inconsistencies in Scansaroli's testimony (pp. 20-22).

We have dealt above with the "inconsistencies" concerning "computation" of the tax credit and the purportedly mysterious absence of workpapers supporting the tax credit calculation (see p. 7, *supra*). The other "inconsistencies" argued by the government concern the reasons for confirmation procedures used during the 1968 audit and Scan-

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* While the government implies it was only through arduous cross-examination that this concession was wrung from Scansaroli's lips, the fact is that Scansaroli freely made the same concession to the SEC three years earlier (T. 1661).

saroli's "emphatic denial" that he expressed fear of losing his license. As to the former, does the government seriously contend that Scansaroli's use, before the SEC and the Grand Jury, of the words "touch and go" in describing Randell's view of the relationships between NSMC's account executives and some of the agencies it dealt with is substantively different from the word he used at trial: "fidgety" (T. 1499)? It is that difference which supplies the requisite criminal intent?*

As to the latter, the fair reading of Scansaroli's testimony is that, rather than "emphatically denying" he had expressed to Natelli a concern about his license, he simply denied **recalling** having expressed such concern. Indeed, Scansaroli testified that if Natelli recalled the statement in question, "[H]e's an honest man, I will agree with him, but I don't recall it" (T. 1681). Hardly an "emphatic denial."

It is true that Scansaroli did deny telling Kurek, more than five years earlier, that he felt he should put his certificate in a locked box, during a post-lunch conversation that Kurek didn't take seriously (T. 455). But can this single conversation, even assuming it showed "guilty knowledge," supply the deficiencies in the proof that Scansaroli **did** anything criminal concerning which he might feel guilty? Is this evidence sufficient to support conviction?

We submit that this very question was answered in a decision announced only last week, *United States* v. *Johnson*, Doc. No. 74—2437 (2d Cir. April 1, 1975). The defendant was charged with and convicted of conspiracy and aiding and abetting the importation of methamphetamine. On appeal, as here, the central issue was the sufficiency of the evidence (Slip Op. at 2675). At the Canadian border, dur-

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* Contrary to the government's assertion (at page 21 of its brief), Scansaroli did **not** testify that if the **relationship** had been "touch and go" the sales should not have been booked at all. He testified that if the salesmen were not **sure** of a sale, income should not be booked (T. 1600).

ing questioning by a customs official, the defendant falsely claimed to be a hitchhiker and falsely denied previously knowing his companion—who had in fact been a close friend for many years. He also disclaimed knowledge of the plastic bags found in their car. When he was arrested two weeks later, and informed that the arrest related to an entry into Vermont from Canada, the defendant falsely denied ever having been in Canada.

The government argued, as it does here, that these false statements, coupled with his close association with his companion and his **presence** in the car were sufficient to support the conviction. This Court reversed, squarely holding that falsehoods are insufficient to support conviction where the other evidence is weak (*cf.* Judge Tyler's remarks on the closeness of this case with respect to Scansaroli [T. 2134-35]):

> While false exculpatory statements made to law enforcement officials are circumstantial evidence of a consciousness of guilt and have independent probative force, *United States* v. *Parness,* 503 F.2d 430, 438 (2 Cir. 1974); *United States* v. *Lacey,* 459 F.2d 86, 89 (2 Cir. 1972), this Circuit in *United States* v. *Kearse,* 444 F.2d 62 (2 Cir. 1971), and *United States* v. *McConney,* 329 F.2d 467, 470 (2 Cir. 1964), has held that falsehoods told by a defendant in the hope of extricating himself from suspicious circumstances are **insufficient proof on which to convict where other evidence of guilt is weak** and the evidence before the court is as hospitable to an interpretation consistent with the defendant's innocence as it is to the Government's theory of guilt. Accord *United States* v. *Lopez-Ortiz,* 492 F.2d 109, *pet. for reh. en banc denied,* 494 F.2d 1296 (5 Cir. 1974)." Slip Op. at 2681

II

The Trial Court Erred in Refusing to Define "Aiding and Abetting" for the Jury.

(Scansaroli Main Brief, pp. 39-43; Government Brief, pp. 65-69)

When it deals with the venue issue raised in Natelli's brief, the government argues that "The case against both defendants was submitted to the jury on the theory that they could be found to be guilty as aiders and abettors" (Gov't. Br., p. 84). Despite that claim, the government advances three rationalizations for the trial court's acknowledged refusal to define "aiding and abetting" in its charge to the jury: that Scansaroli "neither requested a definition, nor did he object to any omission of a definition from the charge" (Gov't. Br., p. 65); that the charge Scansaroli did request "was fully delivered to the jury" (Gov't. Br., p. 66); and that the trial court need not have charged the jury "at all" on aiding and abetting because Section 32 of the Securities Exchange Act of 1934 includes the phrase, "causes to be made" (Gov't. Br., p. 69).

1. The government's first contention is simply wrong. Scansaroli requested detailed instructions on aiding and abetting (Request Nos. 17, 21, 22; A. 234, 239-40) as did the government itself (Gov't. Request No. 10; A. 152-53). In fact, an excerpt from one of Scansaroli's Requests (No. 17) is quoted in the third footnote on page 66 of the government's brief, one page after the contention that Scansaroli made no such request.

And in arguing that Scansaroli failed to object to the trial court's error, the government apparently overlooks another of its footnotes, the first on page 65, quoting that portion of the transcript in which counsel's objection was begun and—as the transcript plainly reflects—was abruptly cut short by the trial court. After the court stated, **"I refuse to go any further"** (T. 2387, quoted

at page 41 of our main brief but not even mentioned by the government), any additional objection would have been pointless.*

2. As quoted in our main brief (at page 40), the trial court charged the jury that conviction would be warranted by a finding that the defendants "made these misstatements or they caused them to be made **or** they **aided and abetted** in their making" (T. 2341).

The government's second contention begins with the concession that Scansaroli requested the following charge:

> In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seeks by his action to make it succeed (Request No. 17; A. 234).**

The government argues that this requested definition of aiding and abetting "was fully delivered" when the trial court told the jury, "[Y]ou still have to ascertain . . . that the defendant under consideration knowingly and wilfully either put or caused to be put false or misleading material facts into that proxy statement or knowingly and wilfully assisted in this conduct with a realization of what was going on and a desire to participate in this scheme" (T. 2371). But this instruction was given 30 pages after

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* Since the defendants in *United States* v. *Famulari*, 447 F.2d 1377, 1382 (2d Cir. 1971), did not raise **any** objection to the charge (concerning accomplice testimony) given at trial and challenged for the first time on appeal, that case is plainly inapposite.

** While this language, based on *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949), and *United States* v. *Peoni*, 100 F.2d 401 (2d Cir. 1938), has been deemed adequate where the evidence of participation is "overwhelming," it has been held to be insufficient in close cases. *United States* v. *Terrell*, 474 F.2d 872, 876 (2d Cir. 1973); *United States* v. *Garguilo*, 310 F.2d 249, 254 (2d Cir. 1962). In *Terrell*, this Court suggested the adoption of a more detailed charge in all aiding and abetting prosecutions. 474 F.2d at 876, n.2.

the trial court told the jury it could convict the defendants for "aiding and abetting" and did not even hint to the jury that it was "aiding and abetting" that was being defined. Moreover, since the instruction included neither the language of the statute nor the language approved in *Peoni*, both of which were requested, the instruction did not approach the minimal standard of definition required in "usual" cases, much less the "extreme precision" required, under *Garguilo*, in close ones. The jury should not have been left to puzzle out for itself what the court was defining and thus what conduct to consider.

In *United States* v. *Bryant*, 461 F.2d 912 (6th Cir. 1972) the court considered at length the importance of a carefully worded aiding and abetting instruction. The conviction was reversed because of inadequate instructions on this subject, in spite of the fact that the defendant submitted no request and made no objection at all to the charge as given (461 F.2d at 921). Because it merely told the jury it might convict on finding aiding and abetting, without defining those terms, the charge given there was the functional equivalent of the charge given here:

> The court charged the jury merely that "the aiding and abetting statute . . . provides in substance that if anyone aids or abets another in the commission of an offense that he is punishable as a principal also. That is what [the] aiding and abetting statute is." This instruction failed to advise the jury of the elements of the crime; it failed to tell the jury that it could convict only upon finding that appellant had a specific criminal intent. The instruction was deficient. 461 F.2d at 920.

The court went on to describe the difficulties in permitting a jury to find its own legal definitions:

> Even though the language of a statute may expressly contain all the elements of the offense, common Eng-

> lish words often will have peculiar legal significance. Cf. Wheeler v. United States, 89 U.S. App.D.C. 143, 190 F.2d 663 (1951). And, some jurors may not be conversant with the common English meaning of common English words. Would a juror, for example, think that "abet" is merely a synonym for "aid" and thus a redundancy, or would he know that it means "to incite, encourage, instigate, or countenance . . . [;] to assist or support in the achievement of a purpose . . ."? Webster's Third New International Dictionary 3 (1961). 461 F.2d at 920.

As in *Bryant*, the trial court here never gave the jury **any** hint as to the meaning of the words aiding and abetting; even the simple request to have the statute read was rejected.*

Struggling to distinguish this Court's decisions in *Garguilo* and *Terrell*, the government points out, correctly, that in those cases, an issue raised by the defendant was "mere presence" as opposed to participation; however, the government goes on to state: "**In this case, however, neither the government's proof nor Scansaroli's defense suggests that [Scansaroli] was a silent bystander.**" (Gov't. Br., p. 68)

That this assertion is nothing less than a brazen misstatement is clear from the government's own argument with respect to the sufficiency of the evidence concerning the booking of the Eastern commitment (see pp. 8-9, *supra*).

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* The government argues that it would not have helped the jury to read the statute because that would **only** have added the words " 'counsels, commands, induces or procures' " (Gov't. Br., p. 66). But the *Bryant* court, 461 F.2d at 921-22, did not see the matter that way, concluding that the use of "words such as 'counsels' and 'commands' " would have focused the jury's attention on the importance of finding intentional conduct.

What does the government argue proved Scansaroli's role?

> "**Scansaroli was present** when the Eastern 'sale' was first proposed." (Gov't. Br., p. 40)
>
> "Kurek testified that **Scansaroli was present** when Natelli and Randell discussed writing off the Pontiac sale and when Randell requested permission to substitute the Eastern 'sale' for the Pontiac 'sale'." (Gov't. Br., p. 41)

Then, citing irrelevant portions of the transcript, the government asserts that in summation, Scansaroli's counsel made no "claim of mere physical presence" (Gov't. Br., p. 68n). What does the government carefully omit?

> Joseph Scansaroli says he has no recollection of Pontiac being discussed that night, he has no recollection of Eastern being discussed that night. What difference does it make whether he does or does not? The fact of the matter is, according to John Buck, Scansaroli had nothing to say on that subject, according to Bernard Kurek, Scansaroli had nothing to say on that subject. (T. 2234)

Could there be a clearer example of a "mere presence" claim? Of a "silent bystander" argument? The most honest answer given by the government is found not in its brief, but in its own request to charge on aiding and abetting:

> [T]o find a defendant guilty of aiding and abetting you must find something more than mere knowledge on his part that the crime was being committed, since a mere spectator at a crime is not a participant. (Gov't. Request No. 10; A. 153)

Unfortunately and, we submit, incorrectly, the trial court declined to include this instruction in its charge.

The cases cited by the government do not excuse the trial court's refusal to define aiding and abetting: In *McDonnell* v. *United States,* 472 F. 2d 1153, 1156-57 (8th Cir.), *cert. denied,* 412 U.S. 942 (1973), "The appellant's entire defense [was] a claim of absence from the scene of the crime . . . There is no evidence from which the jury could have found that appellant was present but not participating in the burglary." In *United States* v. *Milby,* 400 F. 2d 702, 707 (6th Cir. 1968), the charge requested by Scansaroli and refused by the trial court was in fact given to the jury, even though it had not been requested. The court said, "It is the rule that in such a case as this the trial judge should, without request, advise the jury of the applicable law, especially where, as here, it was important that the jury know what conduct of the defendants could be considered by them as amounting to aiding and abetting." And in *Loux* v. *United States,* 389 F. 2d 911, 921 (9th Cir.), *cert. denied,* 393 U.S. 867 (1968), the court distinguished *Garguilo* because "That was a close case, in which there was little evidence of participation by the appealing defendant. Here the issue is much less close."

Here, as Judge Tyler recognized (T. 2134-35), the case as to Scansaroli was close. As *Garguilo* teaches, a close case imposes a special "obligation on the trial judge to instruct the jury with extreme precision" (310 F. 2d at 254).

We respectfully submit that the trial court not only failed to meet this "obligation," it recognized its failure and refused to do more, to "go into the clankety, clankety, clankety which is customarily done. . . ."

3. Finally, the government argues that if one of the statutes under which a defendant is prosecuted includes the word "causes," then "aiding and abetting need not be additionally and specifically charged." (Gov't. Br., p. 69). This argument is belied both by the facts and the government's own theory of the case—as well as by the trial

court's use of the term "aiding and abetting" twice in the charge to the jury—and misrepresents the holding of the cases the government cites in its support, *United States* v. *Colasurdo,* 453 F.2d 585 (2d Cir. 1971), *cert. denied,* 406 U.S. 917 (1972), and *United States* v. *Berlin,* 472 F.2d 1002 (2d Cir.), *cert. denied,* 412 U.S. 949 (1973).

In *Colasurdo,* this Court found "ample evidence that Colasurdo, the president of the filing corporation, caused the false reports to be made" (453 F.2d at 595); in *Berlin,* this Court found it "clear that the evidence was all directed to show that Berlin 'counseled and caused' (words also used in the indictment) the making of the false statement" (472 F.2d at 1009). Thus, in both cases, it was the proof that the defendant had "caused"—and not merely the inclusion of the word in the statute—that rendered an aiding and abetting charge unnecessary.*

Here, of course, since Scansaroli was not an officer of NSMC, he could not "cause" it to file the proxy statement or to do anything else. He simply lacked the power. He could, theoretically, aid and abet the making of such a filing and this was precisely the government's theory of the case:

> The Court: [Y]our contention is that the two defendants here on trial were aiding and abetting Cort Randell, Kurek and others?
>
> [The Prosecutor]: Absolutely. (T. 1342)

Even if, however, the trial court "need not" have mentioned "aiding and abetting" at all in its charge to the jury, the fact remains that it did so. Having done so, particularly in this close case, it should not have permitted the jury to speculate on the definition of this important legal

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* To the extent that a statute includes the word "cause", it of course overlaps subsection (b) of 18 U.S.C. § 2, but not subsection (a). Subsection (b) renders a person liable for acts done by others at his direction. Subsection (a) provides for liability in converse situations.

concept. Scansaroli was entitled to have the trial court define the terms it was using, he requested a definition repeatedly approved by this Court, and he objected to the trial court's refusal to meet its obligation. The jury was told that it might convict upon a finding that Scansaroli was an aider and abettor, but was not given appropriate guidance in making that determination. The conviction should be reversed.

III

The Trial Court Erred in Receiving Hearsay Evidence That Was Never Connected as to Scansaroli.

(Scansaroli Main Brief, pp. 30-33; Government Brief, pp. 69-70)

In our main brief, we demonstrated that the trial court erroneously received, against Scansaroli, hearsay evidence that was never connected to him. We did not argue, as the government misstates it, "that Judge Tyler neglected to rule that there was sufficient connection" (Gov't. Br., p. 69), but rather, that there was **no** connection, despite the trial court's ruling that the requisite connection was furnished solely by Scansaroli's **employment** with PMM (Main Br., pp. 31-32). The government's response misses our point: The evidence was irrelevant as to Scansaroli, and it is no answer that the hearsay objection to the offending evidence may have been cured by the opportunty to cross-examine certain witnesses.

During the presentation of the government's case-in-chief, considerable evidence (including those items listed at pages 30 and 31 of our main brief, among others) was received "subject to connection" with respect to Scansaroli. When the government began to offer summary charts, Scansaroli again objected, on the precise and specific ground that the evidence on which the charts were based had been received subject to connection (T. 1162). At that point, the trial court announced that its earlier re-

ception of evidence "subject to connection" was no longer "binding" because, in the trial court's words, "[T]hey are all in this together" (T. 1163).

As enunciated in the cases cited in our main brief, "The threshold requirement for admissibility is satisfied by a showing of a likelihood of an **illicit association** between the declarant and the defendant. . . ." *United States* v. *Ragland,* 375 F.2d 471, 477 (2d Cir. 1967). The very case cited by the government, *United States* v. *Zane,* 495 F.2d 683 (2d Cir.), *cert. denied,* —— U.S. ——, 42 L.Ed.2d 139 (1974), recognized this principle that admissibility depends on the "existence of a **joint criminal undertaking**" (495 F.2d at 692).

The trial court did not find any "illicit association" or "joint criminal undertaking" that might properly have provided the connection between Joseph Scansaroli and the evidence offered against him (T. 1162-63). It could not so find, because there was no such connection.

Nor did the trial court's later ruling, cited by the government, denying Scansaroli's motion to strike, find the requisite connection (T. 1338-40). Instead, the trial court merely determined that because "count 2 really charges a scheme" this evidence was **ipso facto** admissible. Sorely lacking was any finding that Scansaroli had been shown to be a party to an "illicit association" or a "joint criminal undertaking" as required under *Ragland* and *Zane*. Again, there was no such showing.

The trial court's conclusion that the evidence was admissible merely because—under the court's and government's interpretation—a "scheme" was **charged** (T. 1339-40) was hardly a substitute for proof of such a "scheme." Any suggestion that the questioned evidence was admissible against Scansaroli because "they are all in this together," not only conveys the bleak image of "guilt by association," but also contradicts the trial court's explicit recognition that "That doesn't mean they are all in it criminally, of course."

There was no basis, in law or in fact, for receiving these hearsay declarations against Scansaroli, and the conviction should be reversed.

IV

The Trial Court Erred in Admitting "Fraud Victim" Testimony.

(Scansaroli Main Brief, pp. 33-39; Government Brief, pp. 85-87)

In our main brief, we demonstrated that notwithstanding the trial court's early—and correct—ruling that "fraud victim" testimony should be excluded (T. 701-02), the government was permitted to adduce such testimony from two witnesses, Louis Schauer and Arthur Frommer.* The government argues that the trial court merely excluded testimony concerning what a purported victim "would have done" had he known the undisclosed facts and that the government "neither elicited nor attempted to elicit" any such testimony.**

The government fails to come to grips with the inconsistency between the specific testimony quoted at page 35-37 of our main brief and Judge Tyler's ruling. The reason is obvious: Schauer (as well as Frommer) testified that he didn't know of the write-off of NSMC unbilled receivables and that as a result of the closing, shareholders of Interstate National Corporation "gave up" their investment in that company for shares of NSMC (T. 1058-61; see also, Frommer at T. 1023-24). The logical and inescapable con-

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* The government misstates the record when it asserts (at page 85n. of its brief) that Scansaroli made no objection to Frommer's testimony. The fact is that Scansaroli moved to strike Frommer's testimony, as well as Schauer's (T. 1054, 1137-38).

** The decisions cited by the government (at page 86 of its brief) hardly encourage the use of such testimony.

clusion from this testimony is that if the write-off had been disclosed (to Messrs. Schauer and Frommer), they "would have" acted differently. And, indeed, this was precisely the conclusion drawn by the prosecutor in his summation:

> Ask yourselves, would you go and sell your house, your family's business, take the money out of the savings bank, borrow against life insurance, and buy that stock? Ask yourselves if you would do anything like that.
>
> Well, the defendants knew all of those things and they didn't warn anybody, and **they knew people were relying on this.** Mr. Frommer in fact did go out and sell his business for National Student Marketing stock **because they never warned him.** . . . You may find that he got cheated. (T. 2306; see also T. 2282-83, 2297-98)

Finally, the government argues that this evidence was "relevant and admissible to show the significance of the proxy statement generally and of the misstatements and omissions in it" (Gov't. Br., p. 86). But this was precisely what Judge Tyler ruled should not be done:

> There is a second problem. You have got to prove that the defendants perpetrated a fraud. You promised this jury that that is what you would do. I don't blame you. But I don't think that is helped by having somebody come in here and testify to an ultimate question which the jury itself will decide.
>
> In other words, the witness will in effect be deciding for the jury, in a sense, one of the most important questions in the case, and I don't think that is normally done in our court.
>
> We don't let somebody come in and say, 'Look, jury, if I had to decide your question, I would decide it such and such a way.' (T. 701)

The testimony given by Schauer and Frommer was irrelevant and prejudicial. And the repeated use made of it by the government in its summation (T. 2282-83, 2297-98, 2306) could only serve to inflame the jury. Its reception against Scansaroli was erroneous and deprived him of a fair trial.

CONCLUSION

For the reasons stated above and in our main brief, we respectfully submit that the conviction of defendant Joseph Scansaroli should be reversed.

Respectfully submitted,

MORRISON, PAUL, STILLMAN & BEILEY
Attorneys for Defendant-Appellant
Joseph Scansaroli

Dated: New York, New York
April 9, 1975

Of Counsel:

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EDWARD D. TANENHAUS

National Student Marketing Corp.

Trial Balance
8-31-68

W.P.No.	68-3
ACCOUNTANT	JS
DATE	5-16-69

	Bal. per Report	10-31-68 N.E.T.	12-31 WATSNU	10-31 Renslar	Unaudited 8-30 NSL.	Adjustments and Reclassifications		Final Balance	Balance Without NSL
Net sales:									
Services	3,472,724	3,075,682				(5) 70,200		5,799,644	5,799,644
Sales of products	1,516,722		2,563,856	1,428,188	233,485	(2) 678,562		5,792,251	5,508,766
	4,989,446								
Cost of sales:									
Services	2,183,051	2,298,641				(5) 49,200		3,942,680	3,942,680
Sales of products	550,996		2,153,488	557,720	156,947	(2) 489,812		3,419,151	3,262,204
Gross profit	2,255,399	777,041	410,368	870,468	76,538			4,180,064	4,103,526
Selling, general and Admin. expenses	1,547,867	528,801	176,849	597,003	52,333			2,902,853	2,850,520
Interest and other net	8,416		22,659	4,081				35,156	35,156
Earnings before taxes	699,116	248,240	210,860	269,384	24,205	678,562	489,812	1,242,055	1,217,850
Taxes:									
Federal and state - currently payable	58,396	96,918	108,137	134,000	7,513			404,964	397,451
- deferred	241,769					(2) 188,750		53,019	53,019
Canadian	21,620							21,620	21,620
Net before extra-ordinary items	377,331	151,322	102,723	135,384	16,692	678,562	678,562	762,452	745,760
Extraordinary credit - fed. income tax reduction	10,700		-					10,700	10,700
Net earnings	388,031	151,322	102,723	135,384	16,692	748,762	727,762	773,152	756,460

Per share of common stock: 2,549,000 shares	Per share
Before extraordinary credit	.3073
Extraordinary credit	.0042
Net	.3115

Taxes of Rensselaer Computed at 50% by JS

Receipt of [illegible] Two copies
of the within BRIEF is hereby
admitted this 9TH day of APRIL 1975

Attorney for APPELLEE